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In the

SUPREME COURT OF THE UNITED STATES

October Term, 1963

No. 169

NATIONAL ASSOCIATION FOR THE ADVANCEMENT OF COLORED PEOPLE, A Corporation

Petitioner

v.

STATE OF ALABAMA ex rel. RICHMOND M. FLOWERS
Attorney General of the State of Alabama

Respondent

BRIEF FOR RESPONDENT ON THE MERITS

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Attorney General of the State of Alabama

Respondent

BRIEF FOR RESPONDENT ON THE MERITS

STATEMENT OF THE CASE

On June 1, 1956, the State of Alabama, on the relation of John Patterson, Attorney General of the State of Alabama, filed a suit against the National Association for the Advancement of Colored People, a New York Corporation, in the Circuit Court of Montgomery County, Alabama, in Equity (R. 1).

The suit prayed for a temporary and permanent injunction restraining the said corporation from doing intrastate business in the State of Alabama and for an order on final hearing ousting petitioner corporation from organizing or controlling any chapters of petitioner in Alabama and from exercising any of its corporate functions in the State of Alabama (R. 4).

The temporary injunction was granted, and during its pendency certain contempt proceedings were instituted against petitioner, not pertinent here, except for historical purposes. The litigation with reference thereto may be found in 265 Ala. 356; 265 Ala. 349; 268 Ala. 531; 268 Ala. 504; 271 Ala. 33; 353 U.S. 972; 357 U.S. 449; and 380 U.S. 240.

A suit was filed by petitioner in the Federal Court seeking to have that court adjudicate the merits of this present action and to restrain the State Circuit Court from further proceeding with it. This relief was denied, but the State Court in effect was ordered to try the merits of the action and the motion to dissolve the temporary injunction by January 2, 1962. The memorandum opinion of the Supreme Court of the United States is reported in 368 U.S. 16, and is as follows:

> "October 23, 1961. Per Curiam: The Petition for Writ of Certiorari is granted. The judgment below is vacated, and the case is remanded to the Court of Appeals with instructions to direct the District Court to proceed with the trial of the issues in this action unless within a reasonable time, no later than January 2, 1962, the State of Alabama shall have accorded to petitioner an opportunity to be heard on its motion to dissolve the state restraining order of June 1, 1956, and upon the merits of the action in which such order was issued. Pending the final determination of all proceedings in the state action, the District Court is authorized to retain jurisdiction over the federal action and to take such steps as may appear necessary and appropriate to assure a prompt disposition of all issues involved in, or connected with, the state action. Truax v. Corrigan, 257 U.S. 312, 331-334, 66 L.Ed. 254, 262, 263, 42 S.Ct. 124, 27 ALR 375.
>
> "Mr. Justice Stewart took no part in the consideration or decision of this case."

Starting on December 27, 1961, and ending December 29, 1961, the said Circuit Court did try the issues directed to be tried by the Supreme Court of the United States, and on final hearing *dissolved the temporary injunction,* but issued a permanent injunction against petitioner, its agents, servants, etc., enjoining and restraining them from conducting intrastate business and activities of any kind and ousting petitioner from the State of Alabama. The decree of the Court was entered on December 29, 1961 (R. 209).

It was from the decree entered by the State Court on December 29, 1961 that petitioner appealed to the Supreme Court of Alabama.

On appeal the Supreme Court of Alabama affirmed the State Circuit Court without reaching the merits (R. 221, 229).

This Court has granted certiorari, and oral argument before the Court was made March 24, 1964.

REASON FOR SUPREME COURT OF ALABAMA ACTION

The Supreme Court of Alabama has a rule relative to the assignments of error on appeal. It is as follows:

> "In assigning errors, it shall be sufficient to state concisely, in writing, in what the error consists. Such assignments shall be written or typed upon transcript paper and bound with the transcript, and shall bear the certificate of the appellant, or his counsel, that a copy of the same has been served upon the appellee or his counsel. The words, 'There is no error in the record' written or typed following the assignments of error, or contained in appellee's brief, shall be sufficient joinder in error." (Title 7, page 1154, Recompiled Code of Alabama 1958)

This rule is to apprise the appellate court of the specific questions, raised by specified errors asserted by the appellant, presented for its consideration; and to inform the opposite party of the matters of errors relied on, so that discussion may be limited and concentrated. *Jones v. Adkins*, 151 Ala. 316, 44 So. 53; *Kinnon v. Louisville and Nashville Railroad Co.*, 187 Ala. 480, 481, 65 So. 397. Precision is of the essence of this rule. *Witzel v. Hobbs*, 249 Ala. 431, 31 So.2d 639.

Either from its interpretation of Rule 9, set forth in respondent's brief already on file, or by court decision, it has been a long-standing rule that when one of several unrelated joint assignments of error is not well taken, all must fail. *Dobson v. Deason*, 258 Ala. 219, 61 So.2d 764; *Alabama Chemical Co. v. Hall*, 212 Ala. 8, 10, 101 So. 456.

It has been repeatedly held that assignments of error that judgment and decree are "contrary to the law" or "contrary to the weight of the evidence" or "contrary to the evidence and the law" are not proper assignments of error and when joined with others, it renders them all bad. *Thompson v. State*, 267 Ala. 22, 99 So.2d 198; *Bertolla v. Kaiser*, 267 Ala. 435, 103 So.2d 736.

It is beyond question that the Supreme Court of Alabama has properly applied its own rules to petitioner just as it has to other litigants. The reasons for the rules are plainly stated in the opinions of the Supreme Court of Alabama. Those reasons, from the Federal constitutional standpoint, are either good or bad. Only recently this Court in *Martin v. Walton*, 368 U.S. 25, stated:

> "We cannot disregard the reasons given by the Kansas Supreme Court for the Rules in question. . . . Nor does the fact that the Rules may result "in incidental individual inequality make them offensive to the Fourteenth Amendment. . . ."

This office does not question the power of the United States Supreme Court. It is mighty. But should this Court "by-pass" or "short circuit" the Supreme Court of Alabama?

We respectfully contend that the State Circuit Court decree is not now the final decree by the highest State Court, for the Supreme Court of Alabama is still available if this case is reversed, for decision on the merits, and that Court is the highest Court in this State. 28 USCA, Section 1257; *Fisher v. Perkins*, 122 U.S. 522.

We again restate the applicable law stated in our original brief:

> "It rests with each state to prescribe the jurisdiction of its appellate courts, the mode and time of invoking that jurisdiction, and the rules of practice to be applied in its exercise; and the state law and practice in this regard are no less applicable when Federal rights are in controversy than when the case turns entirely upon questions of local law; and state courts may refuse to consider a Federal claim if the appellant violates reasonable state rules of procedure."

Are the Alabama Supreme Court rules of procedure and practice as applied in this case reasonable?

That should be the question before this Court, and if decided against respondent, the case should be sent back to the State Supreme Court for decision on the merits. *Zorach v. Clauson*, 343 U.S. 306; *Congress of Industrial Organizations v. McAdory*, 325 U. S. 472; *Wilson v. Loew's Incorporated*, 355 U.S. 597; *Parker v. Illinois*, 333 U.S. 571; *Fox River Paper Co. v. Railroad Commission*, 274 U.S. 651, 655.

Any other course will result in an exception for the benefit of NAACP and the application to respondent of a practice seldom, if ever, used.

QUESTION PRESENTED ON THE MERITS

Did the State Court err in enjoining petitioner from doing intrastate business in the State of Alabama and ousting it from the State?

BASIS FOR SUIT

The petitioner, a foreign corporation, has been doing business in the State of Alabama without complying with Alabama law.

The applicable statutory provisions are set forth on pages 2, 3, and 4 of petitioner's brief. We add here Section 232, Constitution of Alabama 1901, as follows:

> "No foreign corporation shall do any business in this state without having at least one known place of business and an authorized agent or agents therein, and without filing with the secretary of state a certified copy of its articles of incorporation or association. Such corporation may be sued in any county where it does business, by service of process upon an agent anywhere in the state. The legislature shall, by general law, provide for the payment to the State of Alabama of a franchise tax by such corporation, but such franchise tax shall be based on the actual amount of capital employed in this state. Strictly benevolent, educational, or religious corporations shall not be required to pay such a tax."

In addition, respondent claimed that petitioner has been engaging in business and activities not permitted by its charter or articles of incorporation and other acts set forth in the "proof" section of this brief contrary to the laws, customs and morals of the people of Alabama so as to render it undesirable to be licensed to do business in this State.

The record also shows that Mr. W. C. Patton, President and Executive Secretary in Alabama for petitioner, testified that he helped organize Alabama State Coordinating Association for Registration and Voting. This was in 1957 after petitioner had been enjoined from doing business in Alabama in 1956; that Mr. Thurgood Marshall and Mr. Roy Wilkins had nothing to do with this corporation. There is evidence, however, of hundreds of phone calls from Mr. Patton to Mr. Wilkins and Mr. Marshall and many heads or former heads of local chapters in Alabama from 1956 on and from which a strong inference may be drawn that petitioner continued to do business in Alabama, after being enjoined in 1956, through Mr. Patton and the Alabama State coordinating Association for Registration and Voting (S Ct. R., p. 93).

PROOF

The references now made to the record are to the three-volume record filed in the Supreme Court of Alabama and now by copy before this Court for its use.

The certificate of incorporation of petitioner provides as the principal objects the following:

> "That the principal objects for which the corporation is formed are voluntarily to promote equality of rights and eradicate caste or race prejudice among the citizens of the United States; to advance the interest of colored citizens; to secure for them impartial suffrage; and to increase their opportunities for securing justice in the courts, education for their children, employment according to their ability, and complete equality before the law." (R. 6)

Mr. *Roy Wilkins*, the Executive Secretary of petitioner, testified that petitioner had functioned and had chapters in Alabama from 1918 until June 1, 1956; that it ceased operations under the order issued by the Court by way of a tem-

porary injunction dated June 1, 1956; that prior to 1956 petitioner had about twelve thousand members in Alabama and about twenty to twenty-five chapters; that the principal objectives of petitioner as set forth in its certificate of incorporation were pursued through its branches in the State of Alabama prior to the year 1956 (R. 683 through 690).

Mr. *Charles G. Gomillion*, Alabama life member of petitioner, testified that petitioner engaged in facilitating and encouraging voting in Alabama; also defense of certain citizens accused of crime; that annual membership campaigns were conducted and dues collected, all in accordance with the constitution of the national organization and the purposes for which it was organized (R. 742).

Mr. *W. C. Patton*, as Executive Secretary, president of a branch at one time, and president of the Alabama Conference of petitioner, testified that he helped to get membership and raise funds; organized branches following the form of constitution and by-laws that was recommended by the national organization (R. 449, 450, 454).

In addition, it was admitted by petitioner's answer that it was a New York corporation; that it maintained its Southeastern Regional Office in Birmingham, Alabama, was listed in the Birmingham telephone directory and had its name on its office door; that it hired and employed both agents and servants to operate its offices; that it furnished legal counsel to represent Arthurine Lucy in her proceedings against the officials and trustees of the University of Alabama in the Federal District Court for the Northern District of Alabama to obtain admission as a student to that university (R. 3, 32, 33).

Petitioner admitted that it had given moral and financial support to Negro residents of Montgomery in connection

with their refusal to use the public transportation system and furnished legal counsel for Rev. M. L. King (R. 33, 677).

The Rev. King was convicted of violating the boycott statute (R. 626 through 635). Petitioner aided and abetted an illegal boycott.

The conduct of petitioner and its counsel in Alabama is also shown by Judge Groom's opinion in the *Lucy* case beginning on page 396 of the record.

Trustees and officials of a state educational institution were charged by counsel furnished by petitioner with conduct which, if sustained, would constitute a violation of the criminal conspiracy statutes of the State of Alabama and those against riots and mobs, also the Federal statute set forth in Title 18, U.S.C.A., Sec. 241 (R. 406).

These charges were false and known to be false by NAACP counsel. These false charges were broadcast to the world over television and radio at a conference in petitioner's Southeastern Regional Office, Birmingham, Alabama, called by NAACP counsel for that purpose. After the harm had been done, the charges were withdrawn (R. 396 through 499).

ARGUMENT

The Constitution and statutes of Alabama relating to qualification in the state to do business by foreign corporation apply to all corporations except those organized under the laws of the United States and those engaged in transacting business of interstate commerce only within this state (page 4, petitioner's brief).

Under Section 232, Constitution of Alabama 1901, supra,

strictly benevolent, educational, or religious corporations shall not be required to pay franchise taxes, but all are required to follow the other applicable provisions for qualification before doing business of an intrastate character in this state.

If a foreign corporation transacts some substantial part of its ordinary business within a state which it was organized to transact, it is "doing business." *Spurlock v. J. T. Knight & Son*, 244 Ala. 364; *Ford Motor Co. v. Hall Auto. Co.*, 226 Ala. 385.

This test is fully met by the proof in this case; indeed, it is not denied. The gravity with which Alabama regards "doing business" without first qualifying as provided by law is evidenced by the provisions of the statute providing for forfeiture and payment to the state of one thousand dollars for each offense. *Kansas City Structural Steel Co. v. Arkansa*, 269 U.S. 148. This statute is as follows (Title 10, Section 21(93), Pocket Part, Code of Alabama 1958):

> "It is unlawful for *any* foreign corporation to engage in or transact any business in this state before complying with provisions of the two preceding sections; and any such corporation that engages in or transacts any business in this state without complying with the provisions of the two preceding sections shall, for each offense, forfeit and pay to the state the sum of one thousand dollars." [Emphasis supplied]

The state under authority of the following cases brought suit to enjoin petitioner from its unlawful acts and to oust it from the State of Alabama. *Standard Oil of Indiana v. State of Missouri*, 224 U.S. 270; *State ex rel. v. Family Loan Co.*, 167 Tenn. 654, 73 S.W. 2d 157; *State v. Standard Oil Co.*, 120 Tenn. 86, 110 S.W. 565; *MacGenniss v. Boston, etc.*, 29 Mont. 428, 75 Pac. 89; *Northwest Ready Roofing Co. v.*

Ames, 117 Neb. 121, 219 N.W. 848; *Griffith v. Knights of Ku Klux Klan*, 117 Kan. 564, 232 P. 254, 37 A.L.R. 1267; 23 AM.Jur., Section 472, page 455; 20 C.J.S., Section 1843. pages 63, 64.

It is clear beyond question that when the United States Supreme Court ordered a trial of this case on the merits, it recognized the right of the state to bring the action in the first instance. It would not order the trial of a case which the State of Alabama had no authority to bring.

In *Paul v. Virginia*, 75 U.S., 8 Wall 168, 181, it was stated with reference to foreign corporations:

> ". . . the recognition of its existence even by other states, and the enforcement of its contracts made therein, depend purely upon the comity of those states, a comity which is never extended where the existence of the corporation or the exercise of its powers are prejudicial to their interests or repugnant to their policy. Having no absolute right of recognition in other states, but depending for such recognition and the enforcement of its contracts upon their assent it follows, as a matter of course, that such assent may be granted upon such terms and conditions as those states may think proper to impose. *They may exclude the foreign corporation entirely;* they may restrict its business to particular localities, or they may exact such security for the performance of its contracts with their citizens as in their judgment will best promote the public interest. The whole matter rests in their discretion." [Emphasis supplied]

This doctrine has been so frequently declared by the Supreme Court of the United States that it must be deemed no longer a matter of discussion, if any question can ever be considered at rest, said this Court in *Horn Silver Mining Co. v. State of New York*, 143 U.S. 305.

In *Horn*, two exceptions were pointed out; one that the state cannot exclude from its limits a corporation engaged in interstate or foreign commerce; and the other, where the corporation is in the employ of the general government.

In addition, other cases are cited as *Interstate Amusement Co. v. Albert*, 239 U.S. 560; and *Crescent Cotton Oil Co. v. Mississippi*, 257 U.S. 129, the latter saying, ". . . even to the extent of excluding it altogether." *Atlanta Refining Co. v. Virginia*, 302 U.S. 22; *American Fire Insurance Co. v. King Lumber and Manufacturing Co.*, 250 U.S. 2, 23 Am. Jur., Foreign Corporations, Sections 15, 20, 25; *Warefield v. Gaston*, 161 Ala. 672; *Armour Packing Co v. Vinegar Bend Lumber Co.*, 149 Ala. 205; *State v. Atlantic Coastline R. Co.* 202 Ala. 558; *Hitchcock v. Bank of United States*, 7 Ala. 386; *Simonetti Bros. Produce Co. v. Peter Fox Brewing Co.*, 240 Ala. 91.

However, even more strikingly in point with the case at bar, are three cases sustaining the power of the state to regulate another membership corporation whose charter also contains statements of worthy aims and ends, namely, *The Knights of the Ku Klux Klan*. The cases are, *State ex rel. Griffith v. Knights of the Ku Klux Klan*, 117 Kan. 564, 232 P. 254; *Knights of the Ku Klux Klan v. Commonwealth*, 138 Va. 500, 122 S.E. 122; and *New York ex rel. Bryant v. Zimmerman*, 278 U.S. 63. The petitioner would have it that these cases may be explained on the basis of judicial notice that the Klan is an organization based upon bigotry and committed to violence. Similarly, this Court is asked to take judicial notice of the noble character and purpose of petitioner.

The striking similarity of Kansas' successful action against the Ku Klux Klan to that which Alabama commenced against this recalcitrant corporation, is immediately

evident. The Supreme Court of Kansas outlined, on the basis of a Commissioner's report, the activities of the Klan in Kansas. It sustained the ouster of the Klan, even though it was a membership corporation, while expressly accepting the commissioner's finding that the evidence was insufficient to show that the Klan engaged in violence and intimidation. The assertion of the right of Kansas to regulate and oust nonprofit membership corporations doing business within its borders is clearly upheld. This case merits the careful consideration of this Court for on appeal to this court it was dismissed for *want of a Federal question. Knights of the Ku Klux Klan v. State of Kansas ex rel. Charles B. Griffith, Attorney General*, 47 S. Ct. 458, 71 L.Ed. 829.

The United States Constitution protects the Klan just as it does petitioner, yet this Court could find no Federal question when the State of Kansas by court action, just as here, ousted the Klan from that state.

CONCLUSION

We submit that the action of the State of Alabama and the decrees of the state courts in this case are all in compliance with state law, decisions of other high courts and, in accordance with permissible decisions of this Court.

No Federal questions of a substantial nature are involved. It is not a race case, both white and Negro belong to petitioner's organization, and by the very purposes of its charter it is supposed to operate to promote equality of right and eradicate caste or race prejudice among citizens of the United States. There is plenty of prejudice on the part of the Negro against the white man, but according to petitioner's brief its sole purpose is the elimination of racial discrimination and segregation and the establishment of

full-fledged citizenship status for Negroes only throughout the United States (Brief, pp. 25, 26).

It is petitioner who resisted the disclosure of its membership lists. It is petitioner who decided to litigate the contempt case rather than disclose its membership. It is petitioner who did not press for trial on the merits while the contempt case was being litigated, although it could have done so. *Board of Revenue of Covington County v. Merrill*, 193 Ala. 521, 68 So. 971; *McCollum v. Birmingham Post Co.*, 65 So.2d 689. It is petitioner who repeatedly requested the state court to give it more time to answer interrogatories (See Respondent's Memorandum in Opposition, Case No. 303). It is petitioner who has filed suit in the Federal District Court. It is petitioner who again started the cry of delay in the Supreme Court of Alabama and in the Federal District Court. The Supreme Court of Alabama and Judge Johnson in the Federal District Court answered effectively these assertions in the opinions shown on pages 9a, 10, and 55a of petitioner's brief on certiorari. On page 55a of petitioner's brief in support of certiorari, the opinion of Federal Judge Johnson is shown and he there stated, "As this Court understands the matter, there is no contention on the part of plaintiff association that the courts for the State of Alabama have not expeditiously handled the case since the action of the Federal appellate courts and the order of this Court of December 13, 1961."

It is petitioner who has violated the laws of the State of Alabama and maligned its servants and agents, including charges against the Attorney General, Circuit Court Judge, and the Supreme Court of Alabama, yet places blame on the State of Alabama.

Petitioner did not step up its activity in Alabama until its

Southeastern Regional office was established in 1951 (petitioner's brief, page 8). Its unlawful activity in Alabama is a continuing offense (Title 10, Section 21(93) Pocket Part, Code of Alabama 1958, supra).

The claim of laches is without merit (See concurring opinion, *Klan* case, supra).

The case on its merit should be affirmed.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I, Gordon Madison, as Assistant Attorney General of the State of Alabama, one of the attorneys for the respondent herein and a member of the Bar of the Supreme Court of the United States, hereby certify that on the ..... day of April, 1964, I served a copy of the foregoing Brief for Respondent on the Merits on Robert L. Carter, Esq., 20 West 40th Street, New York, 18, New York; Maria L. Marcus, 20 West 40th Street, New York, 18, New York; Fred D. Gray, Esq., 34 North Perry Street, Montgomery, Alabama; Arthur D. Shores, Esq., 1527 Fifth Avenue, North, Birmingham, Alabama, attorneys of record for petitioner, by mailing copies in duly addressed envelopes with first-class postage prepaid, and airmail where required.

Gordon Madison
Assistant Attorney General
State of Alabama